

Supreme Court, U. S.

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**In the Supreme Court of the  
United States  
OCTOBER TERM 1977**

NO. 77-748

**BURLINGTON NORTHERN, INC.,**

*Petitioner,*

— vs. —

**HELEN TORCHIA, individually and as  
a personal representative,**

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE  
OF MONTANA**

**BRIEF FOR RESPONDENT IN OPPOSITION**

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## OPINION BELOW

The opinion of the Supreme Court of Montana (App. A of Petition) has not yet been published in the official reports.

### JURISDICTION

This Court lacks jurisdiction to entertain Petitioner's Petition because punitive damages were rejected by the jury at the trial of this cause, the petitioner thus suffered no damage and this Court is not asked to review the judgment of the Supreme Court of the State of Montana, but rather to issue an advisory opinion not affecting the rights of the above named litigants.

### QUESTION PRESENTED

Where punitive damages were pleaded in an FELA case, but rejected by the jury, can the petitioner invoke the jurisdiction of this Court where it has not been damaged even if punitive damages should not be awarded in an FELA case?

### STATUTE INVOLVED

There was no specific statute involved here, but 45 U.S.C. §59 should permit the estate of the deceased rail-roader to sue the employer railroad for punitive damages which section reads:

"Survival of right of action of person injured. Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of a surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

### STATEMENT OF THE CASE

In her pleadings in a Montana District Court respondent alleged that her husband was employed by the petitioner as a fireman on an extra freight train which was

involved in a head-on collision with another extra freight train travelling in the opposite direction and that there were many acts of gross, wanton, and willful negligence on the part of the management and supervisory personnel of the petitioner which caused the death of her husband, and as a result of said negligence, that she was entitled to, not only compensatory damages, but punitive damages.

Following the trial of this cause, the jury awarded compensatory damages and rejected her claim for punitive damages and thus, in any event, the petitioner suffered no damage even if its contentions were correct.

The respondent therefore contends that this Court is being asked for an advisory opinion which would not alter the compensatory award given by a jury to the petitioner even if it should conclude that the petitioner's arguments are correct; consequently, it should not undertake to make a gratuitous declaration upon the propriety of punitive damages in an FELA case.

Secondly, respondent contends that the clear weight of authority supports the submission of punitive damages to a jury in an FELA case.

### ARGUMENT

The petitioner has asked for no relief and none could be granted and since no rights are therefore involved, this Court has no jurisdiction.

The thrust of petitioner's argument is that the Sixth Circuit Court in *Kozar v. Chesapeake & Ohio Railway Co.*, 449 F.2d 1238, held that punitive damages are not proper in an FELA case and that this decision is, therefore, binding upon the Supreme Court of the State of



Montana in an FELA case tried in a Montana District Court.

This Court has never decided this particular question, however, other lower federal courts have held in FELA and Jones Act cases that punitive damages in a proper case of this kind are, in fact, an element for jury consideration. *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F. Supp. 335; *Petition of Den Norske Amerikalinje*, 276 F. Supp. 163; *United States Steel Corporation v. Fuhrman*, 407 F. 2d 1143.

In this regard, we refer the Court to the case of *Robertson Lumber Co. v. Progressive Contractors, Inc.*, 160 N.W.2d 61:

"Where there is a conflict between the decisions of the lower federal courts on federal questions, the state courts are generally free to decide the question for themselves."

The *Robertson Lumber Co.* case then quotes from 21 CJS Courts, Section 206, page 377 as follows:

"Decisions of the lower federal courts on federal questions which have not been passed on by the Supreme Court of the United States should, according to some authorities, be followed by the state courts, although it has also been considered that such decisions, while persuasive, are not binding on the state courts, and a conflict between decisions of the federal courts certainly leaves the state courts free to decide the question for themselves." (Emphasis supplied.)

Thus, the Montana Court was not bound by the *Kozar* Sixth Circuit decision.

In any event the Montana Supreme Court held as set forth at page 7 of Appendix A to the petition on the issue of punitive damages as applied to the facts of the instant case as follows:

"Whether or not evidence of punitive damages has a proper place in an action under the FELA, the jury here refused to allow such damages to plaintiff. In view of the evidence presented by plaintiff and the result reached by the jury, the

presence of the element of punitive damages did not prejudice defendant in this case. *Slifer v. Yorath*, 52 Mont. 129, 155 P. 1113; *Martin v. Corscadden*, 34 Mont. 308, 86 P. 33. Further, the same reasoning applies with reference to the alleged error in the giving of instructions on willful and wanton misconduct and other matters relative to punitive damages. The salient fact remains the jury refused to award such damages and, in fact, specifically found there was no evidence of conduct which would form the basis for punitive damages. Defendant suffered no prejudice as a result. *Hill v. Chappel Bros. of Montana, Inc.*, 93 Mont. 92, 18 P.2d 1106."

The petitioner is really saying that any time punitive damages are pleaded in any kind of a personal injury action and the jury finds that punitive damages should not be awarded that a new trial should automatically follow.

The great and proper weight of authority, however, supports punitive damages in FELA cases.

The decision of the Montana Supreme Court in *State ex rel Burlington Northern, Inc., v. District Court*, \_\_\_\_\_ Mont. \_\_\_\_\_, 548 P.2d 1390, set forth in Appendix F of the petition arose on a writ of supervisory control after the trial of this case and the Court will note that the Montana Supreme Court in that proceeding was persuaded that it was bound by the decision of the highest federal court, or the *Kozar* Sixth Circuit decision. On the question of the propriety of punitive damages in FELA and Jones Act cases by far the greater weight of authority, both by case law and legal writings, supports the proposition that punitive damages are indeed advisable and peculiarly appropriate in the proper FELA and Jones Act case. *Kozar v. Chesapeake & Ohio Railway Co.*, 320 F. Supp. 335; *Petition of Den Norske Amerikalinje*, 276 F. Supp. 163; *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143, 40 Cincinnati Law Review 294; 10 A.L.R. Fed. 514.

### CONCLUSION

Petitioner is asking this court for an advisory opinion. The jury rejected respondent's claim for punitive damages. The trial judge heard the evidence and determined that the petitioner was not prejudiced under the circumstances. The Montana Supreme Court reviewed the issue, read the transcript of the proceedings, read extensive briefs on the subject, heard oral argument on the same issue and properly determined again that petitioner was not prejudiced. Since the specific issue before this Court is not whether punitive damages may or may not be presented in a proper FELA or Jones Act case, but whether the petitioner here presents a substantial federal question when punitive damages were rejected by the trial jury, this question is not one properly brought on for review before this Court. The petition should be dismissed and the judgment of the Montana Supreme Court affirmed.

Respectfully submitted,

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